1960

Federated Milk Producer's Association, Inc. v. Statewide Plumbing and Heating Co. : Brief of Appellant

Utah Supreme Court

Skeen, Worsley, Snow & Christensen; Attorneys for Defendant and Appellant;

IN THE SUPREME COURT

of the

STATE OF UTAH

FEDERATED MILK PRODUCER'S ASSOCIATION, INC., a corporation,
Plaintiff and Respondent,

—vs.—

STATEWIDE PLUMBING AND HEATING CO., a corporation,
Defendant and Appellant.

No. 9214

BRIEF OF APPELLANT

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INDEX

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INTRODUCTORY STATEMENT

Federated Milk Producer's Association, Inc. will be referred to in this brief as Plaintiff or Federated. Statewide Plumbing and Heating Co. will be referred to as Defendant or Statewide.

Federated sued Statewide in the District Court of Salt Lake County, Utah, for property damage resulting from an accident occurring appoximately 7/10ths of a mile north of 9000 South Street on Redwood Road in the City of West Jordan, Salt Lake County, Utah, when Federated's driver collided with a windrow of dirt placed upon a portion of Redwood Road by Statewide's employees in the course of a sewer construction project.

The case was tried before a jury, Judge Ray VanCott, Jr. presiding, on January 7 and 8, 1960. At the conclusion of Federated's evidence Statewide moved the dismissal of the case under the provisions of Rule 41 (b), Utah Rules of Civil Procedure. This motion was taken under advisement. At the conclusion of all of the evidence Statewide moved the direction of a verdict in its favor, no cause of action. This motion was also taken under advisement and the case submitted to the jury. The jury returned a verdict in favor of Federated for $8,657.10.

Statewide later moved the entry of Judgment in accordance with the motions made during the trial or in the alternative for a new trial. This motion was argued on January 22, 1960, and denied. Notice of Appeal was filed by Statewide on February 10, 1960.

STATEMENT OF FACTS

On June 12, 1958, employees of Statewide were constructing a sewer line along the east edge of Redwood Road in the vicinity of 8708 South Redwood Road. In general, the operation consisted of digging a trench by means of a trenching machine, laying pipe in the trench and backfilling the excavation. The trenching machine was proceeding south along the east edge of Redwood Road and was depositing the dirt from the trench along the east or northbound traffic lane of Redwood Road.

When Statewide's employees left the construction area for the day at about 5:30 p.m. there was a 30 inch by 60 inch sign approximately 2/10ths (.2) of a mile south of the south end of the windrow of dirt reading "Construction Slow" and an 18 inch by 40 inch sign reading "One Lane Traffic" (Ex. 18 and 19, R. 83, 209, 210). These two signs were placed together and illuminated by a flare (R. 83, 209, 210, 230). There was no obstruction on the road between these signs and the windrow of dirt where the accident occurred (R. 83).

Immediately south of 9000 South Street was a large luminous sign, 30 inches by 5 feet, reading "Construction Zone" (Ex. 17, R. 207, 208).

Statewide's employees before leaving for the day filled and lighted pot torches and placed them along the windrow of dirt, south of the south end of the dirt, west of the trenching machine which was on the east shoulder, south of the trenching machine and at the "Construction Slow" and "One Lane Traffic" signs (R. 150, 151, 223, 224, 226).

Redwood Road at the place where the accident occurred is 33 feet wide and staight and level (R. 87, 98). It is illuminated by street lights on the west side of the road about 20 feet above the ground located on every other telephone pole. The illumination given by these street lights, however, wasn't "too great" (R. 87).

The road surface was dry blacktop (R. 85, 87). The regular posted speed limit was 40 miles per hour (R. 100). The weather was clear (R. 86).

Approximately 2:48 a.m., June 14, 1958, Carmen C. Jensen, a truck driver employed by Federated, was driving a 1956 International diesel tank-truck north along Redwood Road from 14000 South Street at 30 to 35 miles per hour (R. 117). He did not see any flares or signs indicating construction was in progress (R. 115, 127, 130, 131). He saw nothing on the roadway until

75 to 100 feet from the pile of dirt at which time there was a car in the southbound lane approaching him with its lights on "dim" (R. 116, 117). Jensen's lights were also on low beam (R. 116). As the oncoming vehicle passed he observed the pile of dirt and the trencher. He applied his brakes and attempted to swerve but was unsuccessful. The truck hit the dirt, rolled over and the cargo of milk was spilled (R. 117).

Jensen claimed that the dimmed headlights of the oncoming car "interferred" with his vision (R. 119). However, on cross-examination he testified (R. 133):

> "Q. Did you see this pile of dirt as soon as the headlights of your truck hit it?
>
> A. Yes sir.
>
> Q. And you immediately applied your brakes?
>
> A. Yes sir.
>
> Q. But you were unable to stop?
>
> A. That's right. Until the truck rolled over.
>
> Q. Well that is what I mean. You were unable to miss it?
>
> A. That's right.
>
> Q. Or to stop before striking it?
>
> A. That's right."

Jensen's truck had a cab considerably higher than

the ordinary passenger car (R. 149). Ordinarily he could look right down on top of passing cars (R. 150).

Jensen first saw the oncoming car when it was 6 blocks to a mile away. It dimmed its lights when an appropriate distance away (R. 138). There was nothing unusual about the lights of the oncoming car (R. 134); it was the typical situation encountered in nighttime driving (R. 152).

About the lights Jensen said (R. 134):

> "Q. . . . there was nothing unusual about the head lights of oncoming car?
>
> A. No sir. They were average headlights.
>
> Q. Perfectly normal, average headlights of an approaching car?
>
> A. Yes, sir.
>
> Q. And they didn't blind you, did they? They didn't make it so you couldn't see.
>
> A. No, but they interferred."

After the accident Deputy Sheriff Max W. Perry was summoned to the scene of the accident and made an investigation. He approached the scene from 9000 South traveling north along Redwood Road. He had no difficulty observing the flare and reading the warn-

ing sign 2/10ths of a mile south of the scene of the accident (R. 83, 103, 104). When he arrived he saw the dirt, the trencher and the truck upside down on the windrow of dirt. He measured the road and found it to be 33 feet wide with 3 foot shoulders. The dirt had been scraped by the truck for 78 feet from the south end. He noticed skid marks for a distance of 39 feet south of the south end of the dirt. The windrow was 4 to 5 feet high and 165 feet long and extended to within 3 feet of the center line (R. 84, 85, 86, 108, 131).

He observed a flare pot south of the south end of the windrow of dirt on the road surface and two others in the windrow. None were burning when he arrived (R. 88).

The trencher was 10 to 12 feet high, 6 or 7 feet wide and was painted orange. It was located 10 feet east of the center line of the road (R. 85, 101).

A tachometer taken from Jensen's truck showed a constant speed of 34 to 35 miles per hour from 5 miles south of the accident scene until immediately before the accident (R. 193, 194, 195).

On this state of the record the trial court, nevertheless, submitted the case to the jury which returned a verdict for Federated.

STATEMENT OF POINTS

POINT I

FEDERATED'S DRIVER WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

POINT II

INSTRUCTION NO. 10 WAS ERRONEOUS AND PREJUDICIAL.

ARGUMENT

POINT I

FEDERATED'S DRIVER WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Plaintiff's driver was guilty of contributory negligence as a matter of law in either over driving his headlights or failing to maintain a proper lookout.

In *O'Brien v. Alston,* 61 Utah 368, 213 P. 791 (1923), the plaintiff, riding in an automobile driven by her son at nighttime, was injured when the son ran into a barricade. Since the contributory negligence of the son was imputable to the plaintiff, the Utah Supreme Court reversed a verdict for the plaintiff saying:

> "Independently of statute, it is negligence as a matter of law to drive an automobile along the highway on a dark night at such speed that it cannot be stopped within a distance that objects can be seen ahead of it.
>
> * * *

> Where a person drives an automobile at night, in a dark place so fast that he cannot stop to avoid an obstruction within the distance lighted by his lamps, he is guilty of contributory negligence."

This rule has become a familiar part of the law of this State. It is perhaps most frequently referred to as the Dalley Rule by reason of *Dalley v. Midwestern Dairy Products Co.*, 80 Utah 331, 15 P.2d 309 (1932), and, while numerous exceptions have been carved out of the original statement of the rule, it nevertheless is still controlling case law.

In an attempt to avoid application of the Dalley Rule in this case, the Plaintiff tried to show that the vision of its driver was interferred with by the headlights of an oncoming vehicle. Exceptions of a similar though distinguishable nature were recognized under varying factual circumstances in *Moss v. Christensen-Gardner, Inc.*, 98 Utah 253, 98 P.2d 363 (1940), and in *Fretz v. Anderson*, 5 Utah 2d 290, 300 P.2d 642 (1956).

In the *Christensen-Gardner* case there was an accumulation of smoke and mist in addition to a *sudden glare* from lights of an approaching automobile. In the *Fretz* case the plaintiff driver was *blinded* and upon being so blinded made an appropriate reduction of speed.

In contrast, Plaintiff's driver in this case was not "blinded", nor did he make any reduction in speed. Also, the presence of the headlights of the oncoming car was not either sudden or unexpected.

Some interference from the headlights of oncoming cars is reasonably to be expected during nighttime travel. Where such headlights are dimmed as required by law, they cannot on any logical basis furnish an excuse for failing to see otherwise obvious obstructions upon the highway. To so permit allows a driver to ignore foreseeable conditions, the very foundation of the concept of negligence.

In addition, the evidence is without conflict that this accident occurred in a construction zone where obstructions should have been anticipated and where, indeed, a warning of one lane traffic was given. Since the Plaintiff's driver is charged with having seen that which was plain to be seen, it can be assumed that he was as a matter of law aware of the construction zone and the fact that traffic was restricted to one lane. See *Mingus v. Olsson*, 114 Utah 505, 201 P.2d 495 (1949), and *Conklin v. Walsh*, 113 Utah 276, 193 P.2d 437 (1948).

Under these circumstances his duty was even greater than in the usual case. He had seen the approach of the

oncoming car indicating that its lane was free. As a reasonable man he must be charged with the duty to anticipate that his particular lane would momentarily be obstructed, and yet he made no speed reduction until an accident was inevitable.

In *Kansas Transport Co. v. Browning* (10 Cir., 1955), 219 F.2d 890, the plaintiff brought suit for personal injuries and property damage arising out of an accident in which the plaintiff's truck collided with defendant's standing truck on Highway 81 near Salina, Kansas. A jury verdict in favor of the plaintiff resulted and the defendant appealed, complaining of the refusal of the trial court to direct a verdict on the ground that the plaintiff's own testimony convicted him of contributory negligence barring recovery.

During the trial the plaintiff testfied that just before he collided with the truck he dimmed his lights for an oncoming car and kicked them back up on bright to find the defendant's truck about 30 feet in front of him. He testified that the lights of the oncoming car momentarily blinded him but that he believed the oncoming car dimmed its lights and the situation confronting him at that time was the usual hazard of driving on the highway at night — that it was "no different

from what you normally would encounter in your night driving." In his deposition taken before trial, parts of which were repeated for the record during the trial, he testifed that the oncoming car did dim its lights and that he did not remember that they interferred with his vision. The court said:

> "'The meeting of cars on a main travelled highway is a common and not a special experience of the travelling public.' Harrison v. Travelers Mutual Casualty Co., supra (156 Kan. 492, 134 P.2d 686). And, the momentary blinding by the dimmed lights of an oncoming car is not a sudden and unexpected blinding within the meaning the exception to the rule."

The judgment in favor of the plaintiff was reversed with directions to enter judgment for the defendant.

In *Artz v. Herrera* (Col., 1958), 325 P.2d 927, plaintiff sued for personal injuries received in a collision between an automobile driven by him and a pickup truck being driven by the defendant. The two automobile were approaching each other from opposite directions and side-swiped each other. By way of dictum, the court said:

> "Though a driver may be under a duty to anticipate lawful interference of his vision by

> lawful headlights, he is not obligated to anticipate unlawful interference with his vision by unlawful headlights."

It was held that the questions of negligence and contributory negligence were for the jury. The case actually turned on which car was on the "wrong" side of the road but the distinction between "lawful" and "unlawful" headlights points up the difference between this case and the *Christensen-Gardner* and *Fretz* cases.

If there is nothing unusual about the headlights of the oncoming car and if they are dimmed as required by law, such interference with visibility as may occur, should not prevent application of the Dalley Rule since such interference itself is foreseeable. To hold otherwise is to so riddle the rule with exceptions as to reject it.

POINT II

INSTRUCTION NO. 10 WAS ERRONEOUS AND PREJUDICIAL.

In Instruction No. 10 (R. 241) the jury was instructed:

> "In this State it is negligence for a person to drive a motor vehicle upon a traveled public highway used by vehicles and pedestrians at such a rate of speed that said motor vehicle can-

not be stopped within the distance at which the driver of said motor vehicle is able to see objects upon the highway in front of him.

"You are further instructed that everyone who has driven an automobile in the nighttime, and every observant person who has ridden in an automobile in the nighttime and has met an oncoming automobile with burning lights, knows that the lights obscure objects behind it for a considerable distance before the automobile is reached, until a time after its lights are passed; therefore, if you find that the Plaintiff's driver, Carmen Jensen, was approached by an oncoming automobile with its headlights burning and that his vision was somewhat obscured, his actions at that time and thereafter are to be judged in the light of the driver' knowledge as to these facts and the existing conditions as to what a reasonable and prudent person would have done under the same circumstances."

Exception was made to the second paragraph of this Instruction upon the ground that it was "a comment upon the evidence . . . argumentative . . . contrary to law . . . not applicable under the evidence . . . and . . . improper emphasis upon Plaintiff's contentions . . ." (R. 246).

Rule 51, Utah Rules of Civil Procedure, expressly forbids the trial court to "comment on the evidence in

the case." In *Fox v. Taylor,* (Utah, 1960), 350 P.2d 154, this Court said:

> "We recognize the duty of the Court under our law to avoid comments on the evidence; or which may tend to indicate an opinion as to what the facts are on disputed issues."

Yet here the trial court instructed the jury that Jensen's vision was obscured by saying that "everyone knows" lights obscure objects behind them although Jensen himself admitted that he saw the dirt as soon as it was "hit" by his lights.

The second paragraph of this Intruction was not applicable in view of Jensen's admission as to when he first saw the dirt and his further admission that the lights did not make it so he could not see (R. 133, 134) nor did he at any time testify that his vision was "obscured".

CONCLUSION

The undisputed evidence in this case shows Federated's driver guilty of contributory negligence. By his own admission any interference by oncoming lights did not affect his vision.

Even if we assume actual interference with his vision by "dimmed" headlights, however, this should

not be engrafted as another exception to the already heavily scarred body of Dalley.

If trial by jury is something more than mere formal approval of the views of the trial court, comments by the court as to what "everyone knows" must be prohibited.

The Judgment in this case should be reversed with directions to enter Judgment for the Defendant, no cause of action, or, as a minimum of relief, a new trial should be ordered.

Respectfully submitted,

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